Khatijah bt Md Ibrahim & Anor v Allen Choong Ching Yet & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO PA-22NCVC-85–03 OF 2019
AMARJEET SINGH JC
5 NOVEMBER 2019

Civil Procedure — Civil Procedure — Writ and amended statement of claim — Plaintiffs claimed damages from defendants — Defendants applied to strike out plaintiffs' writ and amended statement of claim — Whether claim res judicata, abuse of process and barred under s 6(1) of Limitation Act 1953 — Limitation Act 1953 s 6(1) — Rules of Court 2012 O 18 r 19(1)

The first plaintiff was the registered owner of a parcel of land ('the land') and the second plaintiff was her son. The eighth defendant had sued the first plaintiff for specific performance of a contract for the sale of the land ('the earlier action'). The earlier action was concluded in favour of the eighth defendant with the learned judicial commissioner making an order of specific performance for the sale of the land. On 28 March 2019 the plaintiffs filed this writ where they claim to have suffered the following damage: (a) the risk of losing the said land; and (b) financial losses and loss of reputation. The damage was alleged to have arisen from a conspiracy to injure, breach of trust, abuse of power, fraud and misrepresentation by the defendants individually or jointly ('the pleaded causes of action'). Hence, these five applications by the defendants pursuant to O 18 r 19(1)(b) and (1)(d) of the Rules of Court 2012 to strike out the plaintiffs' writ of summons and amended statement of claim. The main grounds, and which were common to all defendants, were that the claim was res judicata, an abuse of process and barred under s 6(1) of the Limitation Act 1953 ('the Act').

Held, allowing encls 13, 24, 26 and 30 with costs; and striking out the plaintiffs' writ and amended statement of claim:

(1) There was no real or practical difference between the issues to be litigated in the present action with the issues that had already been decided in the earlier action. The present action would undoubtedly involve going over precisely the same evidence and the same witnesses that were before the learned judicial commissioner in the earlier action. The present action was caught by both issue estoppel and cause of action estoppel. The fact that the parties in the present action were different from the earlier action did not disentitle the defendants from invoking the doctrine of issue

estoppel to bar the plaintiffs from relitigating the same issues to contradict the earlier final judgment (see paras 20–21).

(2) This action to recover or recoup the legal costs and expenses of the earlier action was nothing but a collateral attack on the final judgment in the earlier action. The present action was therefore an abuse of the process of court (see para 25).

(3) The plaintiffs' causes of action were in tort. Therefore, under s 6(1)(a) of the Act the action must be commenced within six years from the date on which the cause of action accrued. The cause of action for the tort of conspiracy and the other pleaded causes of action arose on 11 March 2013 and the last day to file the present action fell on 10 March 2019. On this date the entire set of facts giving rise to an enforceable claim were present. The plaintiffs were time barred when they filed their writ of summons against the defendants (see paras 29 & 33).

[Bahasa Malaysia summary

Plaintif pertama adalah pemilik berdaftar sebidang tanah ('tanah') dan plaintif kedua adalah anaknya. Defendan kelapan telah menyaman plaintif pertama untuk pelaksanaan spesifik kontrak untuk penjualan tanah ('tindakan terdahulu'). Tindakan terdahulu diselesaikan memihak kepada defendan kelapan oleh pesuruhjaya kehakiman yang bijaksana membuat perintah pelaksanaan spesifik untuk penjualan tanah itu. Pada 28 Mac 2019 plaintif memfailkan writ ini di mana mereka mendakwa telah mengalami kerugian berikut: (a) risiko kehilangan tanah tersebut; dan (b) kerugian kewangan dan kehilangan reputasi. Kerugian itu dikatakan telah timbul daripada konspirasi untuk mencederakan, pelanggaran amanah, penyalahgunaan kuasa, penipuan dan salah nyata oleh defendan secara individu atau bersama ('kausa tindakan yang diplid'). Oleh itu, lima permohonan oleh defendan menurut A 18 k 19(1)(b) dan (1)(d) Kaedah-Kaedah Mahkamah 2012 untuk membatalkan writ saman dan penyataan tuntutan terpinda plaintif. Alasan utama, dan yang mana sama terhadap semua defendan, ialah tuntutan itu adalah res judicata, penyalahgunaan proses dan dilarang di bawah s 6(1) Akta Had Masa 1953.

Diputuskan, membenarkan lampiran 13, 24, 26 dan 30 dengan kos; dan membatalkan writ dan penyataan tuntutan terpinda plaintif:

(1) Tidak terdapat perbezaan yang nyata atau praktikal antara isu-isu yang akan dibicarakan dalam tindakan semasa dengan isu-isu yang telah diputuskan dalam tindakan terdahulu. Tindakan yang ada sekarang sudah tentu melibatkan keterangan yang sama dan saksi yang sama di hadapan pesuruhjaya kehakiman yang bijaksana dalam tindakan terdahulu. Tindakan sekarang ditangkap oleh kedua-dua isu estoppel dan kausa tindakan estoppel. Hakikat bahawa pihak-pihak dalam tindakan sekarang berbeza dari tindakan terdahulu, tidak menghalang defendan

daripada mengajukan doktrin isu estoppel untuk menghalang plaintif daripada membicarakan semula isu yang sama untuk membantah penghakiman akhir yang terdahulu (lihat perenggan 20–21).

(2) Tindakan ini untuk memulihkan atau mendapatkan semula kos dan perbelanjaan undang-undang tindakan terdahulu adalah serangan kolateral terhadap penghakiman akhir dalam tindakan terdahulu. Oleh itu, tindakan sekarang adalah penyalahgunaan proses mahkamah (lihat perenggan 25).

(3) Kausa tindakan plaintif adalah dalam tort. Oleh itu, di bawah s 6(1)(a) Akta tindakan itu mesti dimulakan dalam tempoh enam tahun dari tarikh kausa tindakan bermula. Kausa tindakan untuk tort konspirasi dan kausa tindakan yang lain yang diplid timbul pada 11 Mac 2013 dan hari terakhir untuk memfailkan tindakan ini jatuh pada 10 Mac 2019. Pada tarikh ini seluruh set fakta yang menimbulkan tuntutan yang boleh dikuatkuasakan telah diberikan. Plaintif telah dihalang masa apabila mereka memfailkan writ saman mereka terhadap defendan (lihat perenggan 29 & 33).]

Cases referred to

Ahmad bin Hussin v Hajjah Mek binti Haji Hussain [1973] 1 MLJ 18, FC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Bolo v Koklan and Ors (1930) LR 57 IA 325, HC (refd)

Chung Khiaw Bank (M) Bhd v Tio Chee Hing [2004] 3 CLJ 59, CA (refd)

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122; [2015] 2 CLJ 1062, CA (refd)

Golf Park Supermarket (S) Sdn Bhd v Hap Hing Sdn Bhd & Anor [1996] MLJU 62, HC (refd)

Kerajaan Malaysia v Mat Shuhaimi bin Shafiei [2018] 2 MLJ 133; [2018] 3 CLJ 1, FC (refd)

Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v Liew Choong Kin [2018] 3 MLJ 354; [2018] 6 CLJ 217, CA (refd)

Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd [2011] 6 MLJ 788; [2011] 5 CLJ 866, CA (refd)

Machinchang Skyways Sdn Bhd & Anor v Lembaga Pembangunan Langkawi & Anor and another appeal [2015] 2 MLJ 373; [2015] 3 CLJ 775, CA (refd)

Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd) v Kenneth Godfrey Gomez & Anor [2011] 5 MLJ 219, CA (refd)

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

North West Water Ltd v Binnie & Partners (a firm) [1990] 3 All ER 547, QBD (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16; [1993] 3 CLJ 606, SC (refd)
Reichel v Magrath (1889) 14 App Cas 665, HL (refd)
Solai Realty Sdn Bhd v United Overseas Bank (M) Bhd [2013] 4 MLJ 545, CA (refd)
Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494; [1986] 1 CLJ 548, SC (refd)
Tanalachimy a/p Thoraisamy & Ors v Jayapalasingam a/l Kandiah & Ors (sued as liquidators of the Great Alonioners Trading Corp Bhd) and another appeal [2014] 4 MLJ 85; [2015] 1 LNS 340, CA (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1, PC (refd)

Legislation referred to

Limitation Act 1953 s 6(1)
Rules of Court 2012 O 18 r 19(1), (1)(b), (1)(d)

Andrian Selvarajoo (Elfina Roselini with him) (Ramli Yusuff & Co) for the plaintiffs.
Saw Lim Khai (Chooi, Saw & Lim), Khoo Boon Yen (The Chambers of BY Khoo), Ramsun Ho (See Ramsun & Tan), Daphne Choy (Choy & Assoc) and Anoop Singh (Devodjit Singh with him) (Anoop & See) for the defendant.

Amarjeet Singh JC:

INTRODUCTION

[1] There are five applications made pursuant to O 18 r 19(1)(b) and (1)(d) of the Rules of Court 2012 to strike out the plaintiffs' writ of summons and amended statement of claim. The main grounds, and which are common to all defendants, are that the claim is res judicata, an abuse of process and barred under s 6(1) of the Limitation Act 1950.

[2] The parties to this action. The first plaintiff is the registered owner of a parcel of land known as Lot No 3, Section 5, Town of Georgetown, North East District, Penang ('the said land'). The second plaintiff is her son. The eighth defendant had sued the first plaintiff for specific performance of a contract for the sale of the said land vide High Court Civil Action No 22NCvC-97–06 of 2014 ('the earlier action'). The first and second defendants were the first plaintiff's solicitors while the third and fourth defendants were the eighth defendant's solicitors handling the said sale and purchase transaction. The fifth, sixth and seventh defendants had at one time or another acted as solicitors for the eighth defendant which included filing the cause papers and litigating the earlier action. The ninth and tenth defendants are directors of the eighth

defendant ('the directors') while the 11th and 12th defendants are property brokers ('the brokers').

[3] The earlier action was concluded on 27 February 2015 in favour of the eighth defendant with the learned judicial commissioner making an order of specific performance for the sale of the said land. On 7 December 2015 the first plaintiff's appeal to the Court of Appeal was dismissed and on 14 July 2016 her application for leave to appeal the Court of Appeal's decision to the Federal Court was also dismissed. The High Court's judgment therefore became the truth between the parties.

[4] On 28 March 2019 the plaintiffs filed this writ where they claim to have suffered the following damage:

(a) the risk of losing the said land; and

(b) financial losses and loss of reputation.

[5] The damage is alleged to have arisen from a conspiracy to injure, breach of trust, abuse of power, fraud and misrepresentation by the defendants individually or jointly ('the pleaded causes of action'). As a result, the following damages are sought from the defendants jointly or severally:

(a) RM600,000 as the costs and expenses incurred litigating the earlier action and which is still ongoing;

(b) general and aggravated damages; and

(c) RM6m as exemplary damages.

THE FACTS PLEADED IN THE AMENDED STATEMENT OF CLAIM

[6] The material facts pleaded in the amended statement of claim are as follows:

(a) that sometime in November 2012, the brokers approached the first plaintiff for the sale of the said land who retained the services of Messrs Tan Siew Kin & Assoc to handle the transaction. The first plaintiff was however advised to wait until the disposal of two caveat actions that were filed against her in respect of the said land ('the caveat actions');

(b) the first plaintiff retained the services of the first defendant from Messrs Allen & Assoc ('the second defendant') to deal with the caveat actions;

(c) at about the same time the second plaintiff was introduced by the brokers to the directors who made an offer to purchase the said land. The second plaintiff made it clear to all parties that he had no authority to make any decision in respect of the said land;

(d) on 21 December 2012, the second plaintiff met the ninth and 11th defendants at their request and in that meeting was asked to sign a letter dated 18 December 2012 the contents of which said that the signatory is the owner of the said land and has agreed to sell the said land at RM130 a sqft to the ninth defendant or his nominee ('the letter of intent'). The second plaintiff initially refused to sign the said letter on the ground that he was not authorised to represent the first plaintiff for the sale of the land;

(e) however, the second plaintiff on the assurances made by the 11th defendant relented and signed the letter of intent. The second plaintiff said he did so only on the assurance that the purpose of the letter of intent was to convince the board of directors of the eighth defendant to provide funds for the purchase of another parcel of land in the vicinity of the said land ('Lot No 6') in a public auction;

(f) on 16 January 2013, the second plaintiff at the request of the first defendant attended his office where the directors and brokers were also present. In this meeting the second plaintiff was informed that pursuant to the letter of intent signed by him, the eighth defendant as nominee of the ninth defendant had agreed to purchase the land as per the price stated therein. The second plaintiff was shown a letter from Messrs San & Assoc ('the fourth defendant') which had enclosed a cheque representing 10% of the purchase price ('the cheque'). The second plaintiff denied agreeing to sell the said land to the eighth defendant and accused the brokers and directors of falsely misrepresenting the use of the letter of intent. The second plaintiff also accused the first defendant for breaching the trust that the plaintiffs had placed in him. Notwithstanding this it was alleged that Messrs Allen & Assoc later informed the second plaintiff via email that as solicitors of the first plaintiff they had caused the cheque to be banked into the client's account as stakeholders;

(g) on 11 March 2013, it came to the plaintiffs' knowledge vide the notice of lodgement of a caveat on the said land by the eighth defendant that a statutory declaration made by the third defendant from Messrs San & Assoc has stated that the first plaintiff had agreed to sell the land pursuant to a sale and purchase agreement and had accepted payment of 10% deposit of the purchase price through her solicitors, Messrs Allen & Assoc;

(h) the second plaintiff immediately demanded that Messrs Allen & Assoc return the deposit on the ground that the firm was never retained by the first plaintiff to represent them on any other matter except to litigate the caveat actions;

(i) on 14 March 2013, Messrs Allen & Assoc issued a cheque to return the deposit to Messrs San & Assoc. In the accompanying letter, Messrs Allen

& Assoc was alleged to have made an admission that they were not retained to act for the first plaintiff but were merely 'helping' out the second plaintiff; and

(j) on 1 April 2013 the fifth defendant from Messrs CP Tang & Partners ('the seventh defendant') sent the first plaintiff a legal notice on behalf of the eighth defendant to comply with the sale and purchase agreement or face legal action. The refusal of the first plaintiff to comply resulted in the filing of the earlier action.

[7] The particulars of conspiracy and its purpose are stated in paras 87–91 of the amended statement of claim. It is said that Messrs Allen & Assoc and the first defendant were never retained or authorised by the first plaintiff to transact or negotiate the sale of the said land. The eighth defendant through the directors and the brokers proceeded to arrange meetings with the second plaintiff which culminated in the letter of intent prepared by the first defendant being signed on the misrepresentation of the 11th defendant. After the letter of intent was signed a meeting was held at the premises of Messrs Allen & Assoc where in the presence of the directors and brokers the second plaintiff was informed that the eighth defendant has accepted the offer as per the letter of intent and enclosed the cheque representing 10% of the purchase price for the sale of the said land. The first and third plaintiffs then negotiated and settled the terms and conditions of the sale and purchase agreement without the knowledge of the plaintiffs. This was followed by the fourth defendant making a statutory declaration which was used to lodge a caveat on the said land. When the first plaintiff refused to execute the sale and purchase agreement the eighth defendant sued for specific performance. It was alleged that the defendants colluded together with the objective of denying the plaintiffs ownership over the said land for their own interests.

THE LAW ON STRIKING OUT

[8] It is trite, that an application to strike out an action under O 18 r 19(1) of the Rules of Court 2012 is a drastic power and should be exercised with utmost caution. At this stage the court does not determine the merits of the case. The court assumes that the pleaded facts are true and proven and will only allow the relief of striking out a claim if on the undisputed facts the claim is obviously unsustainable (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7).

[9] If the application to strike out is made under paras (b) or (d) of O 18 r 19(1) the court is entitled to consider the affidavits and the history of the case but is not entitled to resolve any dispute of facts on affidavit evidence. Where abuse of process is alleged in relation to any previous litigation between the parties or their privies, it is the duty of the court to undertake a minute

examination of the history of the prior litigation and scrutinise the evidence in the affidavits with a fine tooth comb (*Chung Khiaw Bank (M) Bhd v Tio Chee Hing* [2004] 3 CLJ 59; *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 and *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16; [1993] 3 CLJ 606).

[10] It is trite that the court will not allow its machinery to be abused or used as a means of vexation or oppression or for the advancement of any unlawful object. In determining whether there is abuse of the process the court is entitled to take into account public policy considerations (see *Solai Realty Sdn Bhd v United Overseas Bank (M) Bhd* [2013] 4 MLJ 545 and *Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v Liew Choong Kin* [2018] 3 MLJ 354; [2018] 6 CLJ 217).

[11] Where res judicata has been established actions are validly struck out under paras (b) or (d) of O 18 r 19(1) (see *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122; [2015] 2 CLJ 1062 and *Tanalachimy a/p Thoraisamy & Ors v Jayapalasingam a/l Kandiah & Ors (sued as liquidators of the Great Alonioners Trading Corp Bhd) and another appeal* [2014] 4 MLJ 85; [2015] 1 LNS 340) and where limitation under s 6(1) of the Limitation Act 1953 has been established actions have been struck out under paras (b) or (d) of O 18 r 19(1) (see *Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd) v Kenneth Godfrey Gomez & Anor* [2011] 5 MLJ 219).

RES JUDICATA

[12] I shall now deal with the first ground. The question to be decided here is whether res judicata has been established. The law on res judicata is settled and is to found in the often quoted case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 and has been recently reaffirmed in *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 2 MLJ 133; [2018] 3 CLJ 1 where the Federal Court reminded that the underlying rationales of the doctrine of res judicata and abuse of process are 'founded on the consideration of public policy that it is in the public interest that there should be finality in litigation and decisions made by courts of competent jurisdiction, and that no one should be vexed twice for the same kind of litigation'.

[13] In *Asia Commercial Finance* it is stated that res judicata creates an estoppel per rem judicatum and are two types of such estoppel: 'cause of action estoppel' and 'issue estoppel'. The position can be summarised as follows:

(a) the cause of action estoppel arises where the rights or liabilities involving a particular right to take a particular action in court for a particular

A remedy are determined in a final judgment. The cause of action cannot be relitigated between the same parties in a subsequent action;

(b) the cause of action estoppel extends to all other causes of action, based on the same facts or issues, which should have been litigated or asserted in the earlier action resulting in the final judgment;

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(c) the issue estoppel means that neither the same parties nor their privies in a subsequent action will be allowed to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties and neither will such parties be allowed to adduce evidence or advance any argument to contradict such decision; and

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(d) the issue estoppel also extends to an issue that is raised in a subsequent proceeding which involves a different cause of action to which the same issue is relevant and to a situation where an issue raised in a subsequent proceeding is an issue which might have been and which was not brought forward in the earlier action.

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[14] I noted that in the present action there are additional parties which were not parties in the earlier action. The law as to non-parties in the context of res judicata was stated by Drake J in *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547 as follows:

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> I find it unreal to hold that the issues raised in two actions arising from identical facts are different solely because the parties are different or because the duty of care owed to different persons is in law different. However, I at once stress my use of the word 'solely'. I think that great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel or abuse of process. *Before doing so the court should be quite satisfied that there is no real or practical difference between the issues to be litigated in the new action and that already decided, and the evidence which may properly be called on those issues in the new action*. (Emphasis added.)

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[15] At home, the Court of Appeal in *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788; [2011] 5 CLJ 866 held that res judicata expresses a general public interest policy that the same issue or cause of action should not be litigated more than once even if the parties are different. That the doctrine applies to a non-party was also reaffirmed by Idrus Harun JCA instructively in *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122; [2015] 2 CLJ 1062 in the following words:

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> [25] In the present appeal, since the present action would undoubtedly involve going over precisely the same facts as in the previous HTF suit, and accepting the broader approach and the wider sense of res judicata as the preferred and correct legal position, the fact that the parties to this suit are different from the HTF suit does not disentitle the appellant to invoke the doctrine of issue estoppel to bar the

respondent from relitigating a specific issue that had been decided in the prior separate action. The doctrine also applies to a non-party. It is therefore not necessary for parties to be the same in both actions. What the doctrine seeks to prevent is an abuse of the process of the court by attempting to make a double claim as well as allowing the plaintiff to relitigate its cause for the same relief and based on the same subject matter for which judgment had successfully been obtained in the HTF suit and to produce the same set of facts, the same witnesses and the same documents (see *Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Pahang Darul Makmur*).

APPLICATION OF THE DOCTRINE TO THE FACTS

[16] This exercise requires the court to consider the issues that will arise in the present action and the issues that were determined in the earlier action. In the earlier action the main issue was whether there was a concluded contract between the first plaintiff and the eighth defendant. It was decided that there was a concluded contract based on the letter of intent signed by the second plaintiff and the acceptance of the deposit by Messrs Allen & Assoc as stakeholders. The ancillary issue which was crucial to this main issue was whether the second plaintiff had the requisite authority from the first plaintiff to instruct Messrs Allen & Assoc to handle the sale and purchase transaction as solicitors for the first plaintiff. The learned judicial commissioner held that the second plaintiff had the requisite authority and did instruct Messrs Allen & Assoc accordingly. The first defendant and Messrs Allen & Assoc were therefore found clothed with the necessary authority to act as the first plaintiff's solicitors in the matter. In the present action the correctness of the determination of these same crucial issues are being challenged or sought to be relitigated albeit through the allegation of conspiracy and the other causes of action pleaded by the plaintiffs.

[17] In the earlier action it was an issue whether the second plaintiff had signed the letter of intent as the authorised representative of the first plaintiff with the specific purpose of selling the said land. In the present action the correctness of the determination of this issue is being challenged or sought to be relitigated on the allegation that the letter of intent was signed as a result of misrepresentation by the 11th defendant.

[18] In the earlier action a determination was made that the second plaintiff attended the meeting held on 5 March 2013 where the first and third defendants were settling the terms and conditions of the sale and purchase agreement as the representative of the first plaintiff. It was the finding of the learned judicial commissioner in the earlier action that the second plaintiff had the requisite knowledge of the nature of the negotiations between the solicitors. In the present action the correctness of this determination is being challenged or sought to be relitigated under the pleaded causes of action. It is the allegation

in the present case that the plaintiffs had no knowledge of such agreement or of such negotiations as they were kept in the dark by the solicitors.

[19] In the earlier action it was an issue whether the attempt by the second defendant to refund the 10% deposit was as a result of the lack of authority to act as the first plaintiff's solicitors. The learned judicial commissioner found as a fact that the attempt by the second defendant was a manifestation of a change of mind on part of either the first plaintiff or the second plaintiff. In the present action the correctness of this determination is being challenged or sought to be relitigated on the same evidence that was before the learned judicial commissioner.

[20] It is plain and obvious that there is no real or practical difference between the issues to be litigated in the present action with the issues that has already been decided in the earlier action. The present action would undoubtedly involve going over precisely the same evidence and the same witnesses that were before the learned judicial commissioner in the earlier action. Further the conspiracy and the other causes of action being raised in the present action could, and should, have been raised in the first plaintiff's counterclaim in the earlier action. In my judgment the present action is caught by both issue estoppel and cause of action estoppel.

[21] The fact that the parties in the present action are different from the earlier action does not disentitle the defendants, who were not parties in the earlier action except for the eighth defendant, from invoking the doctrine of issue estoppel to bar the plaintiffs from relitigating the same issues to contradict the earlier final judgment. The principle in *Dato' Sivananthan Shanmugam* applies with full force on the facts and circumstances of this case.

DOCTRINE OF ABUSE OF PROCESS

[22] Apart from the doctrine of res judicata I am of the considered view that the present action is an abuse of the process. The courts possess an inherent power which any court of justice must possess to prevent misuse of its process. Res judicata is separate and distinct from the doctrine of abuse of the process although both rest on the same underlying rationales as referred to earlier. The doctrine was recently reaffirmed by the Federal Court in *Mat Shuhaimi Shafiei*. The doctrine of abuse of process was enunciated in *Reichel v Magrath* (1889) 14 App Cas 665 at p 668. In that case Lord Halsbury LC said:

> My Lords, I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again ... I believe there must be an inherent jurisdiction in every Court of Justice to prevent such an abuse of its procedure and I therefore think that this appeal must likewise be dismissed.

[23] The doctrine was earlier applied by the Supreme Court in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] 1 CLJ 548 Eusoffee Abdoolcader SCJ stated as follows:

> There is more over the inherent jurisdiction of the court in cases where ... the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require.

(see also *Golf Park Supermarket (S) Sdn Bhd v Hap Hing Sdn Bhd & Anor* [1996] MLJU 62)

[24] The present action not only seeks to relitigate or contradict the final judgment in the earlier action but also seeks to recover damages which arose naturally upon the granting of the order for specific performance. An action that seeks to recover losses naturally incurred due to losing a case is an abuse of process and must be nipped in the bud otherwise they would bring the administration of justice into scandal and disrepute. The plaintiffs pleaded (in para 92 of the amended statement of claim) that they are at risk of losing the said land. An order of specific performance in relation to a sale and purchase of land has the effect of the party not honouring the agreement to lose the land. In the present case by virtue of the order of specific performance the first plaintiff is required to transfer the said land to the eighth defendant upon the purchase price being paid to the stakeholders.

[25] Further, the alleged loss of legal costs and expenses is a direct consequence of being unsuccessful in the earlier action. It is a natural consequence of failing to succeed in a court action. This action to recover or recoup the legal costs and expenses of the earlier action is nothing but a collateral attack on the final judgment in the earlier action. The present action is therefore an abuse of the process of court.

LIMITATION

[26] Whether limitation applies is a question of law and fact. In this case the facts and dates in the amended statement of claim and the affidavits filed in support and opposition of the respective striking out applications are not in dispute. On the assumption that the facts pleaded are true and will be proven this court is in a position to determine whether this action is barred under s 6(1) of the Limitation Act 1950.

[27] The plaintiffs argue that the action is not caught by limitation. They appear to take the position that time runs from either 1 April 2013, the date the plaintiffs received the notice of action to commence legal proceedings from the

A eighth defendant's solicitors. For this reason it is submitted that the present action filed on 28 March 2019 is commenced within time and therefore not caught by the said statute of limitation.

B **[28]** The defendants, on the other hand, submitted that time began to run at the earliest on 11 March 2013 when the plaintiffs discovered that the deposit was not returned by Messrs Allen & Assoc or the latest by 14 March 2013 when the plaintiffs demanded that Messrs Allen & Assoc to return the cheque to the solicitors of the eighth defendant. Taking the latest date, the present action should have been commenced on or before 13 March 2019 and therefore the C present action is barred by the said statute of limitation as the action was only commenced on 28 March 2019.

THE LAW ON LIMITATION

D **[29]** The plaintiffs' causes of action are in tort. Therefore, under s 6(1)(a) of the Limitation Act 1950 the action must be commenced within six years from the date on which the cause of action accrued. There are two questions that arise when limitation is invoked against a plaintiff. The first is a question of law E which requires the answer to this question: when did the defendant's right of action accrue? The answer would tell us when time begins to run. The second is a question of fact which requires an answer to this question: when did the first clear and unequivocal threat by the defendant of the plaintiff's right occur? This question depends on the nature of the particular cause of action and the F answer will ascertain if the cause of action was commenced within the statutory period (*Ahmad bin Hussin v Hajjah Mek binti Haji Hussain* [1973] 1 MLJ 18 and *Nasri v Mesah* [1971] 1 MLJ 32). The Federal Court in the above cases followed the principle enunciated by the Privy Council in *Bolo v Koklan and Ors* (1930) LR 57 IA 325 at p 331 which reads:

G > There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.

H **[30]** In the context of the tort of conspiracy to injure, the Court of Appeal in *Machinchang Skyways Sdn Bhd & Anor v Lembaga Pembangunan Langkawi & Anor and another appeal* [2015] 2 MLJ 373; [2015] 3 CLJ 775 held that the cause of action accrued when there was an infringement or threat of infringement of the claimant's right. The relevant paragraph states:

I > [22] Given that the plaintiffs had known on 10 November 2002 of the fact that the maintenance, operation and management of the cable car system was given to the second defendant, it would be at that point of time that there was an infringement or threat of infringement of the plaintiffs' rights under the JVA. And if there is any conspiracy between the first and the second defendants as alleged by the plaintiffs, it would also be on 10 November 2002. On 10 November 2002, the entire set-of

facts giving rise to an enforceable claim were present (see *Nasri v Mesah* [1971] 1 MLJ 32).

[31] It is clear from the undisputed facts that the conspiracy to injure alleged is actually made up of the individual acts of the defendants which constitute the other causes of actions that are pleaded. The amended statement of claim reveals (as shown above) that all these acts when combined constitute the action for conspiracy to injure.

[32] The facts in the present case show that the plaintiffs had asserted their right on 16 January 2013 not to sell the said land and made accusations of breach of trust and misrepresentation against the first defendant. The facts also show that the action for conspiracy to injure was complete on 11 March 2013 the date the right of the plaintiffs was infringed by the eighth defendant. On this date it came to plaintiffs' knowledge that the eighth defendant had lodged a caveat on the said land on the grounds that the first plaintiff had agreed to sell the said land pursuant to a sale and purchase agreement and had accepted the payment of 10% deposit of the purchase price through her solicitors, Messrs Allen & Assoc. There was therefore a clear and unequivocal threat to infringe the plaintiffs' right over the said land.

[33] Therefore the cause of action for the tort of conspiracy and the other pleaded causes of action arose on 11 March 2013 and the last day to file the present action fell on 10 March 2019. On this date the entire set of facts giving rise to an enforceable claim were present. The plaintiffs were time barred when they filed their writ of summons against the defendants.

CONCLUSION

[34] Enclosures 13, 24, 26, 29 and 30 are allowed with costs. The plaintiffs' writ (encl 1) and amended statement of claim (encl 17) are struck out.

Enclosures 13, 24, 26 and 30 allowed with costs; and plaintiffs' writ and amended statement of claim struck out.

Reported by Ahmad Ismail Illman Mohd Razali